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Back to a Future: Reversing Keith Simpson's Death Sentence and Making Peace with the Victim's Family through Post-conviction Investigation

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BACK TO A FUTURE: REVERSING KEITH SIMPSON'S DEATH SENTENCE AND MAKING PEACE WITH THE VICTIM'S FAMILY THROUGH POST-CONVICTION INVESTIGATION

John H. Blume and Sheri Lynn Johnson*

I. INTRODUCTION

In 1993, Keith Simpson was arrested for the murder of Joe Harrison; in 2006, he was sentenced to life with the possibility of parole in 2022. Between those two events, Simpson was sentenced to death, had his death sentence vacated by the post-conviction relief court, reached a plea agreement with the victim's family and the new Solicitor, saw the agreement invalidated when the Attorney General's office overrode the family and the Solicitor by appealing the post-conviction court's decision, lost the lower court's decision to an appellate reversal, and won a cross-appeal for a new trial.

You just never know. You don't know how a capital case will end, of course, but more importantly, you don't know what facts will determine how it ends. Even now, we—the authors, and post-conviction counsel for Simpson—would be hard pressed to say which facts mattered the most. One reason for this difficulty is that different facts seem to have mattered to the two different courts that reviewed this case. The one thing we do know about *Simpson v. State* is that *investigation* mattered. This is a lesson that most of the life stories in this volume repeat, in one form or another, and it's a lesson that bears repetition. Indeed, in the post-conviction setting, the likelihood of review by more than one court—along with the possibility that different facts will matter to different courts—increases the need for a truly comprehensive investigation, one that covers the range of what *might* matter.

We think, moreover, there may be a second lesson in this case and our belief in the importance of that lesson is the reason we chose Keith Simpson's story. Here is the more speculative and subtle lesson: To be persuasive, post-conviction mitigation stories often need a retelling of the client's life and a retelling of the crime itself. Put differently, as much as possible, "life stories" need to be both consistent and complete.

II. THE STORY THE JURY HEARD: A RACIALLY-MOTIVATED, EXECUTION- STYLE MURDER

A. The State's Case

The State charged Keith Simpson, and his co-defendant, Loyal Stokes, with robbing Harrison's Market in Enoree, South Carolina, murdering the store's owner, Joe Harrison, and shooting a customer, Anthony Scott, who was standing

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* Professors, Cornell Law School. Along with Russell Ghent, Esq., we served as post-conviction counsel for Keith Simpson. We wish to thank Naomi Terr, Paula Swenson, Pierre Armand, and Malcolm "Ty" Meeks, who were all Cornell Law School students at the time, for their many hours of investigative work on the case.

in the parking lot. According to the indictment, Simpson shot Harrison, and Stokes shot Scott. Don Thompson, who had never tried a death penalty case, was appointed to represent both Simpson and Stokes.[1] After the State decided to seek the death penalty against Simpson—but not against Stokes—Thompson was relieved of his representation of Stokes. Phil Sinclair was then appointed as Simpson's second attorney.

Simpson's case was prosecuted by the Solicitor for the Sixth Judicial Circuit, Holman Gossett. At the guilt-or-innocence phase, the State presented a chilling and largely uncontradicted story: Simpson, motivated by racial hatred, shot a kindly store owner execution-style, and then ran off with his victim's money.

Russell Stevenson testified that he went with Simpson and Stokes on the afternoon in question to visit a cousin, Jonell Geter.[2] Geter testified that while passing by the Harrison store, Simpson said that he was going to rob the store, and that he "had not killed a white man today."[3] Geter and Stevenson both testified that, shortly after Simpson and Stokes left, they heard shots coming from the direction of Harrison's store.[4] Stevenson, however, said nothing about Simpson's purported "white man" remark.

Several witnesses testified that Simpson entered the store while Stokes remained outside. Anthony Scott was inside, making a purchase from Joe Harrison; Scott finished his purchase and walked out.[5] Nathan Scott, Anthony Scott's nine-year-old son, testified to hearing loud noises and coming to the front of the store to investigate, at which point Simpson pointed the gun at him and "clicked" it several times.[6] Nathan said he hid behind the slot machines, came out from behind them, and saw Simpson standing behind the cash register with money in his hands.[7] Nathan had said nothing in his pretrial written statement about seeing Simpson with money, and on cross-examination, he stated that he recalled seeing Simpson with the money after someone from the Solicitor's Office "helped" him.[8] To bolster the credibility of Nathan's trial testimony, the State called Detective Rick Gregory, who said that he had interviewed Nathan Scott prior to taking his written statement, and that at that time, the boy had mentioned seeing money in Simpson's hands.[9] Gregory did not, however, have any notes from this interview, or even notes documenting that any such interview had occurred.[10] The only other evidence of robbery was the testimony of Willie Rice, who testified that he had borrowed a twenty-dollar bill from Harrison not long before Harrison was shot, and that he saw twenty-dollar bills in the cash

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[1] Appendix at 2989, 2957-58, Simpson v. Moore, 627 S.E.2d 701 (S.C. 2006) [hereinafter App.].
[2] *Id.* at 1364.
[3] *Id.* at 1347.
[4] *Id.* at 1358, 1399.
[5] *Id.* at 1128, 1144.
[6] *Id.* at 1166-68.
[7] *Id.* at 1170, 1174.
[8] *Id.* at 1186-87.
[9] *Id.* at 1456-57.
[10] *Id.* at 1507-11.

register at that time.[11] This detail was important because when the police arrived, the cash register drawer was open, and there was money in each of the compartments *except* the one for twenty-dollar bills.[12] Rice, however, like Nathan Scott, had given a less helpful pretrial written statement that referred to borrowing "a couple dollars," and made no mention at all of seeing twenty-dollar bills in the cash register.[13]

David Rhodes, who was working in the stockroom, testified that he heard shots, hid in the cooler, and saw Harrison walking towards the back of the store.[14] Rhodes said that when he opened the cooler, Harrison told him to call 911, then turned, took several steps and collapsed.[15] Anthony Scott testified that when he heard the shots from outside the store, he jumped out of his pickup truck and began running toward the front of the store.[16] Stokes then fired several times at Scott, seriously wounding but not killing him.[17] Witnesses who had been sitting outside, drinking, testified that Stokes began firing randomly toward them, but hit no one,[18] and others testified that Simpson aimed his gun at them.[19]

Medical examiner John Wren, M.D., testified to the results of his autopsy, creating the most damaging picture of the death of Joe Harrison. According to Dr. Wren, Harrison suffered three separate gunshot wounds. The first wound was in Harrison's right palm, a "through-and-through" wound exiting through the back of the hand. Dr. Wren testified that he saw no gunpowder or stippling on the wound, and that the bullet hole was very circular, with no skin splitting, and he therefore characterized the injury as a distant wound – one fired a minimum of ten-to-fifteen inches away from the target. According to Dr. Wren, this hand wound may have been inflicted while the hand was in a defensive position.[20]

Dr. Wren next discussed the second gunshot wound, which entered the lower-right abdomen and lodged in Harrison's upper-right back. In Dr. Wren's opinion, this injury was also a distant wound. Most damaging was his conclusion that the nine defects found in Harrison's bunched-up blue jeans, combined with the sharp upward trajectory of the bullet through Harrison's body, could only mean one thing: The victim must have been lying down when he was shot.[21] On cross-examination, trial counsel posed alternative situations to explain the sharp

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[11] *Id.* at 1086-87.
[12] *Id.* at 1068, 1447.
[13] *Id.* at 1106-07.
[14] *Id.* at 1202-05.
[15] *Id.* at 1205.
[16] *Id.* at 1130-31.
[17] *Id.* at 1135-38.
[18] *Id.* at 1218, 1228.
[19] *Id.* at 1260-61, 1278.
[20] *Id.* at 1654-55. On cross-examination, trial counsel compounded this damning testimony by defining "defensive wound" for the jury, something the prosecution had ignored: "Defensive wound is usually where someone holds out a hand and tries to block the effects of the gunshot?" *Id.* at 1669. If the image of Simpson shooting the supplicant Harrison was not vivid enough from Dr. Wren's testimony, defense counsel's definition brought the picture into focus.
[21] *Id.* at 1661-62.

bullet trajectory, but Dr. Wren dismissed these hypotheses, explaining that these scenarios would have distorted the bullet, and no distortion was present.[22]

According to Dr. Wren, the third bullet also produced a distant wound of "more than twelve to fifteen inches."[23] Despite trial counsel's knowledge that Dr. Wren had "a reputation of being someone who would be favorable to the State,"[24] despite his client's account of what happened—that the first gunshots went off during a struggle over the gun—and despite Harrison's tough reputation,[25] counsel did not attempt to impeach Dr. Wren's testimony by calling an independent forensic expert of any sort, or by using the statements of two previous State witnesses to the effect that Harrison was standing when they heard the gunshots.[26]

B. The Defendant's (Apparently) Bald-Faced Lies

Simpson's statements were introduced as part of the State's case-in-chief. In his final statement, he admitted shooting Harrison, but denied taking money and maintained that Harrison was not lying down when the shots were fired.[27] Simpson testified in his own defense at trial, amplifying the story of his final statement. He admitted spending time with Geter and Stevenson, but denied ever talking about killing anyone, or saying anything about race.[28]

According to Simpson, he had planned to rob the store with Stokes, but as he approached the counter where Harrison was waiting on Anthony Scott, he both recognized Scott and realized that a child (Scott's son) was present.[29] He "chickened out," and was attempting to get Stokes's attention through the window to let him know that he was not going to do anything, when his gesturing allowed Harrison to see the handle of his pistol.[30] Harrison grabbed for the gun,

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[22] *Id.* at 1673.

[23] *Id.* at 1666.

[24] *Id.* at 2967.

[25] During preliminary investigations in Enoree, trial counsel Phil Sinclair interviewed an old school friend who intimated, "Knowing Joe Harrison, it's possible that he could of [sic] tried to take the gun." *Id.* at 3163.

[26] In order for Dr. Wren's trial interpretation to jibe with Scott's and Rhodes's accounts, Simpson would have had to shoot Harrison in the left buttock, knocking him to the floor. Then, during a brief period when neither Scott nor Rhodes saw Harrison on the ground, Simpson would have had to shoot Harrison as he lay on his back. Finally, after Simpson fled, Harrison would have had to hop to his feet after receiving three bullet wounds and walk to the back of the store for help. As unlikely as this scenario seemed, trial counsel did not confront Dr. Wren with these conflicts on cross-examination.

[27] App., *supra* 1, at 1495-97.

[28] On cross-examination, Simpson maintained that when he and his friends first began talking about committing a robbery, "[w]e wasn't talking about killing." *Id.* at 1745. He denied saying he would kill Harrison and adamantly denied saying that he "hadn't killed me a white man today": "No, sir. I was talking about robbing, but I never referred to killing anybody. I never referred to no particular store, and I didn't refer to no color." *Id.* at 1746.

[29] *Id.* at 1719-20.

[30] *Id.* at 1721, 1723.

and during the struggle for it, the gun went off more than once. Simpson testified that Harrison then broke away from the struggle, and ran out from behind the counter.[31] Simpson heard a sound behind him and turned to see the boy, Nathan, standing behind him; he claimed he did not intend to point the gun at the child or to shoot him, but admitted that he might have cocked the gun as he turned around.[32] Simpson then wheeled back around, saw Harrison still standing, and fired two more shots, aiming at his legs to bring him down. Simpson maintained that he fired the fatal shots while in the grip of fear and confusion set off by the struggle and the initial shots, and claimed that he intended only to disable Harrison so he could get away.[33] He testified that he ran out without taking anything from the store, leaving empty-handed.[34]

Trial counsel called no witnesses to support Simpson's account of the homicide. Thus, the only evidence before the jury that contradicted the State's theory of a racially-motivated, execution-style killing was Simpson's obviously self-interested testimony. In closing, the prosecutor mocked Simpson's story of a struggle and his denial that he took money. He began his closing argument by telling the jury that Simpson's testimony had been "totally discredited by the other witnesses in this trial and by his own testimony," and argued that what Simpson said was inherently implausible:

> He wants you to believe that fifty-eight year old Joe Harrison assaulted him. That's what his testimony is . . . . His testimony . . . is not worthy of belie[f]. Why? He has a bias. He's on trial for murder. And as the judge will tell you, you have the ability to take into consideration that he has a prior record of a crime of moral turpitude or untruthfulness.[35]

Next he argued that the physical evidence did not support Simpson's testimony, emphasizing Dr. Wren's testimony that the wound to Harrison's hand was a "distant wound."[36] Finally, he dismissed Simpson's testimony that the first shots went off as he and Harrison were struggling over the gun. Rather than struggling, the Solicitor told the jury, Harrison "stood there helpless and defenseless"; "Harrison "wasn't just shot by accident, and he wasn't shot in a struggle [but] . . . was shot three times as he tried to run, tried to get away."[37]

Trial counsel argued that the evidence was more consistent with voluntary manslaughter than with murder.[38] Using the gun and the jury-box rail as props,

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[31] *Id.* at 1721-22.

[32] *Id.* at 1748-49.

[33] "When I shot that first shot, it was like he was like staggering or falling, and I shot again. But I never intended to—I never intended to kill him or nothing. . . . I just wanted to shoot him like to just make him fall, like try to shoot him in the leg and disable him . . . just so I could get out of there." *Id.* at 1721.

[34] "I left the beer and the money and the change. . . . I just ran. I was so scared." *Id.* at 1723.

[35] *Id.* at 1791-92. Simpson had testified that he had a prior conviction for larceny. *Id.* at 1690.

[36] *Id.* at 1807.

[37] *Id.* at 1807.

[38] *Id.* at 1831, 1839.

Counsel attempted to demonstrate that Simpson's testimony was consistent with the physical evidence of the victim's wounds.[39] Counsel also disputed the State's theory that Simpson shot Harrison while the latter lay on the floor, reminding the jury that Dr. Wren "didn't say there was no possibility that the angles could happen any other way. The coroner said 'most likely that's probably it, but I can't tell you what angle these people were at.'"[40]

With no forensic expert to corroborate even the possibility a struggle, and no lay witnesses to impeach Geter's account of Simpson's racial animus, it was not surprising that the jury convicted Simpson of robbery and capital murder.

C. Getting to Death

At the sentencing phase, the State maintained that Simpson came from a loving home with every opportunity in the world available to him, but that he chose to become a robber and murderer. Defense counsel offered no compelling contrary evidence. Counsel did present three expert witnesses, but these witnesses conducted the most cursory of evaluations and essentially testified that there was not much mitigation present in Simpson's case. Mary Schultz, a social worker, and the defense's only expert on Simpson's traumatic childhood, stated that Simpson's main problem was that he lacked contact with his biological parents. But trial counsel did not even ask Schultz to explain how this had affected Simpson's development. Schultz also unhelpfully observed that Simpson's "work history has been sporadic," largely due to the fact that he "would start a task, and then for no apparent reason he would leave it and come back later. . . . You can't do that and hold down a job."[41] Dr. James Evans, a clinical psychologist, generally characterized Simpson as "slow" and somewhat prone to paranoia, schizophrenia, and mania. Dr. Evans reported that he had tested Simpson for brain damage but that the test results were inconclusive.[42] Finally, Dr. Dafferlin Barnard-Dupree, a forensic psychiatrist, diagnosed Simpson with dysthymic disorder (i.e., abnormal unhappiness) and alcohol/drug dependence, but testified that most people who suffer from these illnesses function normally.[43] The defense also presented several lay witnesses who provided general "good guy" mitigation, but did not address the issue of his racial attitudes or proclivity to violence, or in any other way impeach Geter's account of Simpson's desire to kill a "white man."[44]

The jury sentenced Simpson to death.

D. Affirmance of the State's Story on Direct Appeal

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[39] *Id.* at 1837-38.
[40] *Id.* at 1837 (internal quotation marks added).
[41] *Id.* at 2093.
[42] *Id.* at 2109.
[43] *Id.* at 2120.
[44] *Id.* at 1997-2072.

From reading the direct appeal opinion, one would infer that there was no contest at all over what happened in Harrison's store. The recitation of the facts is limited to *one sentence*: "The victim was shot and killed during a robbery of his convenience store."[45] None of the six issues raised in the appeal challenge the State's basic narrative.[46] The State court found no merit in any of these claims. With respect to the only claim even related to the evidence of aggravation and mitigation presented, the opinion states only that the jury's finding of aggravating circumstances was "supported by the evidence," and that the death penalty "here is not excessive or disproportionate to the penalty imposed in similar capital cases."[47]

III. THE STORY THE POST-CONVICTION COURT – AND THE VICTIM'S FAMILY – HEARD: A BOTCHED ROBBERY BY A TRAGICALLY IMPAIRED DEFENDANT

By the time most cases reach post-conviction, the picture is clear, and it does not reflect a charitable view of either the defendant or his crime. This is almost a truism because if the story were either murky or mixed, it is unlikely that a defendant would have been sentenced to death and that a death sentence would have been affirmed.[48] For Keith Simpson, the sound-bite of the case as the case went into post-conviction was particularly harsh: "Racist black defendant robs store and shoots white storekeeper execution-style." Since it is hard to imagine a court that wants to grant relief to a black racist execution-style killer, this sound-bite, or snapshot of what the case was about, had to be changed.

As is well-recognized by practitioners, "changing the picture" or "changing the sound-bite" is the primary task of post-conviction litigation.[49] But what dislodges the old sound-bite or snapshot? The answer in post-conviction must start with what should have been the goal at trial: "[A] story . . . that is different from, truer to, and more congruent with the known facts, and thus more compelling, than the prosecution's."[50] According to narrative theory, trials are

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[45] State v. Simpson, 479 S.E.2d 57, 59 (S.C. 1996).

[46] The appellate court rejected claims that: 1) a venireperson was improperly excused; 2) Anthony Scott's testimony that his son was hysterical after the shooting was improperly admitted; 3) a mistrial should have been granted when the Solicitor improperly read into the record a witness's statement that he was afraid that Simpson would come back and shoot him too; 4) the testimony of the victim's wife and son concerning what kind of person he was and what impact his death had on their family should have been excluded as more prejudicial than probative; 5) the judge erred when he refused to instruct the jury that if Simpson were not sentenced to death, he would be ineligible for parole; and 6) that the death penalty was disproportionate to the crime. *Id.* at 59-61.

[47] *Id.* at 61.

[48] *See, e.g.*, Mark E. Olive & Russell Stetler, *Using the Supplementary Guidelines for the Mitigation Function of Defense Teams In Death Penalty Cases to Change the Picture in Post-Conviction*, 36 HOFSTRA L. REV. 1067, 1067-68 (2008).

[49] *See id.* at 1068.

[50] *Id.* For an early exploration of the role of narrative in the life of the law, see Anthony G. Amsterdam, *Telling Stories and Stories About Them*, 1 CLINICAL L. REV. 9 (1994). For Professor

story battles, and in such battles, the party who can tell the most compelling story, one that fits best with each individual juror's narrative, will emerge as the winner.[51] The problem for the post-conviction lawyer, of course, is that the defendant's story has already been declared the loser – at least twice (at trial and on direct appeal), and often three times (if certiorari has been sought and denied).

The only realistic prospect for winning the next story battle is to change the facts for which each side's story must account. Thus, fact investigation is the most crucial task of the post-conviction lawyer. This is not to say that legal theories do not matter at all, but only to say that unless those theories provide a vehicle to deliver a new story, they are unlikely to lead to relief.[52]

The reinvestigation of the facts of Simpson's case proved very productive. The evidence presented at the post-conviction relief ("PCR") hearing suggested a very different sound-bite: a sound-bite rendered persuasive by telling an integrated story that both provided strong support for Simpson's account of the crime, and accurately described Simpson's deficits through the presentation of a wealth of compelling mitigation evidence. In addition, post-conviction investigation into the practices of the Solicitor's Office revealed strong evidence that Solicitor Gossett was influenced by race in his decision to seek the death penalty.

A. New Evidence Supporting Simpson's Account of the Crime

That Simpson shot and killed Harrison was never disputed, but whether he did so in the course of a robbery *was* disputed, and, because robbery was the sole aggravator submitted to the jury, was determinative of the question of whether he was guilty of capital murder. Whether Simpson shot Harrison without provocation and then shot him again as Harrison lay incapacitated on the floor was also disputed, and was highly relevant to whether he deserved the death penalty. Similarly, whether he planned to kill a "white man" was both disputed and significant in any death calculus. After an adequate investigation, substantial evidence existed that: 1) cast doubt on whether money actually was taken; 2) established that the homicide most likely occurred during a struggle over the gun;

Amsterdam's more recent work in this area, *see* ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW (2000). *See also* Richard K. Sherwin, *Law Frames: Historical Truth and Narrative Necessity in a Criminal Case*, 47 STAN. L. REV. 39 (1994).

[51] *See* John H. Blume, Sheri L. Johnson & Emily C. Paavola, *Every Juror Wants a Story: Narrative Relevance, Third Party Guilt and the Right to Present a Defense*, 44 AM. CRIM. L. REV. 1069, 1087-91 (2007) (reviewing literature on legal narratives).

[52] There are exceptions, but these generally depend upon a small class of new, categorical legal developments. Even in such cases, investigation is often necessary. Thus, for example, *Roper v. Simmons*, 543 U.S. 551 (2005), which declares the death penalty for crimes committed by minors to be unconstitutional, creates a new legal theory for exemption from imposition of the death penalty and does not generally require new factual development; after *Simmons*, it was enough to plead *Simmons*, and the generally undisputed, previously established fact of the defendant's status as a minor at the time of the crime. Although there might be a few such post-conviction slam-dunk cases under *Atkins v. Virginia*, 536 U.S. 304 (2002), which exempts persons with mental retardation from execution, in general, despite the change in the governing rule, post-conviction *Atkins* claims require substantial investigation.

3) conclusively established that the victim was not shot when he was lying down; and 4) rendered the racial remark extremely improbable. In short, the evidence adduced at the PCR hearing strongly supported Simpson's account of the crime, thereby lessening both the moral culpability of his actions and the consequent legal liability for those actions.

1. Whether a Robbery Occurred

Simpson presented extensive evidence that no robbery occurred, most of which was possessed by the State at the time of trial but not turned over to the defense. First, Simpson introduced a memo written by Deputy Solicitor Trent Pruett concerning whether the death penalty should be sought in Simpson's case. That memo acknowledged that "no robbery (larceny) occurred. Nothing taken from the store,"[53] and was corroborated by Charles Henderson, a senior investigator in the Solicitor's Office, who testified that he had heard either Pruett or Solicitor Gossett say that "[t]hey had no evidence that the money had been taken or money had even been asked for."[54]

Why had the Solicitor's Office concluded that no robbery had occurred? Notes from the Solicitor's file revealed that police found a bank bag with "a large amount of money in [sic] behind the cash register,"[55] suggesting that Harrison may have transferred money from the register into the bag as the day went on, which would explain the absence of any twenties in the cash-register drawer. The notes also reported that the money was turned over to one of the victim's brothers, and that no accounting to determine whether money was taken was even attempted.[56]

Most importantly, Simpson introduced abundant evidence that Nathan Scott's testimony – that he saw Simpson with the money in his hands – was completely unreliable, and most likely the product of coaching by Chief Investigator Johnny Dyer. Before trial, but after Nathan gave a written statement that made absolutely no mention of seeing money taken, Dyer met alone with Nathan at the boy's home,[58] and then took him alone to the crime scene to prepare his testimony,[59] providing ample opportunity for either inadvertent or deliberate suggestion. These sessions were never revealed to defense counsel. Moreover, the variations in Nathan's account of the events in the store were also kept from defense counsel; the prepared "Q and A" for Nathan from the

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[53] App., *supra* 1, at 4093.

[54] *Id.* at 4472-74.

[55] Seventh Judicial Circuit's Solictor's Office, File 002433 [hereinafter Solicitor's File] (provided to counsel pursuant to discovery request) (on file with author).

[56] *Id.* at 02433; 02440. At the post-conviction relief hearing, Jack Harrison, brother of the victim and co-owner of the store, confirmed that he and his brother kept a moneybag hidden behind the counter, and that sometimes they would transfer money between the register and the bag. PCR Tr. 593-94.

[58] App., *supra* 1, at 4019, 4021-22.

[59] *Id.* 4023-24, 4026.

Solicitor's file has a note at the top stating that the order of the events as Nathan told it would shift.

Dyer denied that he asked Nathan suggestive questions, or tried to get him to change his testimony, but after their meeting, the evidentiary obstacle reported in Truett's memorandum ceased to be an issue; on the eve of trial, Dyer wrote to defense counsel informing him of the changes in Nathan's story.[60]

In the same letter, Dyer told defense counsel that Willie Rice's testimony would likewise change.[61] Dyer was also responsible for preparing Rice's testimony, and the transformation of Rice's story is similarly suspicious. Rice made an initial statement that seemed insignificant, and certainly provided no basis for inferring that a robbery had occurred: He merely reported that he borrowed "a couple of dollars" from Harrison shortly before the robbery. In his trial testimony, however, he claimed that he borrowed *twenty* dollars, *which he saw Harrison peel off the top of a stack of twenties in the cash drawer.* This change in Rice's story was crucial because if he really saw twenty-dollar bills, then it was reasonable to infer that Simpson took them. In addition to the suspiciousness of Dyer's last-minute report that Rice would testify to the presence of twenties, the Solicitor's file provided other evidence of tampering with Rice's story; the draft "Q and A" for Rice contained no questions or answers referring to twenties in the cash register.[62] If indeed Rice had seen the twenties, it is hard to imagine why that fact was not discovered before the "Q and A" was prepared.

At the evidentiary hearing, Simpson also presented specific reasons to doubt the integrity of Dyer. *Six* of Dyer's former colleagues—all former assistant solicitors—testified that Dyer's reputation for truthfulness in the Solicitor's Office was bad by the time of his involvement in the Simpson case,[63] and several of them had heard rumors that Dyer tampered with Nathan Scott's testimony.

Simpson also presented expert testimony concerning the unreliability of Nathan Scott's testimony in his case. Trial counsel did not consult an expert on child witnesses, but if they had done so, persuasive testimony demonstrating the unreliability of Nathan's testimony could have been presented. Dr. Charles Brainerd, a nationally recognized expert in human memory and developmental psychology, first testified to the factors that made Nathan particularly susceptible to suggestion. His age (nine at the time of the crime), his low IQ (70), his learning disability, the presence of a weapon, the fact that he was hysterical immediately after the crime, and the passing of more than a week before his first recorded statement. All these factors would have interfered with his memory of the crime and, therefore, made him more likely to fill in details he did not remember. In addition, there were numerous factors about the interviewing

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[60] Letter from Johnny Dyer to Don Thompson (Aug. 30, 1994) (on file with authors).

[61] *Id.*

[62] Solicitor's File, *supra* note 55, at 02134.

[63] App., *supra* 1, at 3335 (John Paul Abdalla); 3354 (Barry Joe Barnette); 4151 (Robin Clark File); 4489 (Charles Allen Henderson); 5487 (Jason Thomas Wall); 4534, 4539-40 (Beverly Jones).

situations that increased the likelihood that suggestive questioning occurred: The questioners were not "blind," but had a large stake in producing the right answers; there was no recording of what questions they asked; and Dyer took Nathan to the scene of the crime and spoke to him without the presence of any other person. Dr. Brainerd also examined Nathan's actual testimony and found a number of indicators that details were in fact implanted in his memory: Several highly improbable details, the appearance of additional facts as time went on rather than the natural decay of memory,[64] and the appearance of a large number of discrepancies between accounts of what happened, particularly the shifting sequence of events. Moreover, the fact that at trial, the Solicitor had to prompt Nathan to talk about the money increases the likelihood that that memory was false. Dr. Brainerd concluded that Nathan Scott's testimony was not reliable.[65]

2. Whether a Struggle Occurred

At trial, Dr. Wren testified that the victim's hand wounds were not the result of a struggle for the gun, but were defensive injuries, and that Harrison was shot execution-style while lying down on the floor. However, Dr. Wren recanted this damning testimony in his 1999 deposition after confessing that he had not actually taken the medical boards in forensic pathology at the time of Simpson's trial.[66] He then admitted he was wrong about the wound in Harrison's right hand; the bullet hole was surrounded by gunpowder residue after all.[67] With this new discovery, Dr. Wren also re-categorized the hand injury as a loose-contact wound, which indicated either a defensive position or a struggle, thereby belying the trial image of Harrison holding up his hands, trying in vain to protect himself.[68]

Dr. Wren also contradicted his trial testimony regarding how the second bullet's trajectory through the lower right abdomen into the upper right back might have occurred. At trial, Dr. Wren stated conclusively that the injury was a distant wound and that the only plausible explanation for the bullet's sharp upward angle was that Harrison must have been lying down. But during his deposition, Dr. Wren submitted two likely alternatives to his trial depiction of

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[64] When asked about Detective Gregory's testimony to the effect that, prior to giving the written statement in which he made no mention of seeing money taken, Nathan had said he saw the money, Dr. Brainerd expressed the opinion that, had there been any record of the interview, it might have added substantial weight to the credibility of Nathan's story. Given, however, that Gregory's log did not reflect that he had even seen Nathan on the day he claimed to have heard about the money, that he made no notes of the conversation, and how tired he would have been after being up the night before (as his log did reflect), Dr. Brainerd also doubted the reliability of Gregory's recollection of that conversation.

[65] App., *supra* 1, at 3151.

[66] *Id.* at 3252.

[67] *Id.* at 3264.

[68] *Id.* at 3268.

Simpson mercilessly shooting the prone victim, both of which were consistent with the struggle Simpson described.[69]

The PCR hearing demonstrated that it would have been easy to obtain experts to inform counsel's questioning of Dr. Wren and to corroborate Simpson's version of what had happened at the Harrison store. In part, Dr. Wren had relied upon the nine defects found in Harrison's bunched-up blue jeans, combined with the sharp upward trajectory of the bullet through Harrison's body, to conclude that Harrison must have been lying down when he was shot. Jeff Hollifield, an expert in trace metals and residue, tested the holes in Harrison's pants for traces of copper or lead residue. He found no "indication of lead residue or copper residue or any gun powder flakes or metal fragments or primer material around any of those particular holes."[70] Based on these test results, Hollifield concluded that the pant defects were not bullet holes at all, thereby contradicting Dr. Wren's statement at trial that the nine defects in Harrison's pants indicated that Simpson shot Harrison while he was lying down. Hollifield offered further support for Simpson's statement that he aimed the second shot down at the counter. Investigators found a bottle opener on the store countertop that was covered with assorted nicks and cuts, as well as a semicircular impression at one end. According to Hollifield, the diameter of the impression measured 9.5 millimeters, the same diameter as a .38 caliber bullet.[71] Hollifield also detected trace amounts of copper on the bottle opener, which would indicate that a copper-jacketed bullet had struck the opener.[72]

Wayne Hill, an expert in homicide reconstruction events and firearms, also supported Simpson's story of a physical struggle for the gun. Based on his review of trial transcripts, law enforcement reports, autopsy reports, and crime scene photographs, Hill believed that the first two gunshots occurred during a struggle for the gun.[73] Hill found that the presence of gunpowder residue around the wound and fingertips of the right hand, without stippling, "would be consistent with having your hand around the [gun] barrel," as would occur in a struggle.[74] Hill also found it most likely that the same bullet went through Harrison's right hand and into his lower-right abdomen before lodging in his upper-right back.

Hill next undermined the State's argument that discharging a double-action firearm, such as a .38 revolver, would "require . . . a conscious effort on the part of the shooter."[75] Rather, two people struggling over a weapon could "absolutely" generate the trigger pull necessary to discharge the firearm.[76] If Harrison leaned over the counter and attempted to snatch the gun away from Simpson, it is "probably a safe estimate" that he would "pull on that gun with

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[69] *Id.* at 3289-90.
[70] *Id.* at 2804.
[71] *Id.* at 2807.
[72] *Id.*
[73] *Id.* at 2826.
[74] *Id.*
[75] *Id.* at 1608.
[76] *Id.* at 2832.

13½ pounds."[77] In addition, when Harrison grabbed the gun, Simpson's likely reaction would be to tense his entire hand. Thus, the combination of Harrison's grab and Simpson's retraction would easily produce enough trigger pull.[78]

Hill's examination of the evidence also supported Simpson's assertion that he had aimed the second gunshot downwards, and the bullet deflected off the countertop. Like Hollifield, Hill found the opener contained an area "exactly like bullet impacts."[79] The damage to the countertop and bottle opener suggested a resulting "badly mangled bullet," and police had discovered just such a bullet near the front door of the store.[80]

Finally, Hill's expert testimony also corroborated Simpson's account of the third and fourth gunshots, which occurred as Harrison walked upright from behind the counter. According to Hill's analysis of Harrison's blood stains and blood flow, Harrison must have been standing upright when Simpson shot him.[81] Hill also concurred with Hollifield that the probability of a bullet causing nine semi-holes in the folds of Harrison's pant leg without causing any abrasion to Harrison's actual leg was infinitesimal.[82] Hill concluded that the clothing defects found by Dr. Wren must have been pre-existing, further discrediting Dr. Wren's opinion that these pant holes indicated Harrison's prone position.[83]

Lastly, Dr. Steven Dunton, an expert in forensic pathology, agreed that the physical evidence was strongly indicative of a struggle. The "obvious" gunpowder concentration around the bullet hole in Harrison's right hand, coupled with the faded residue in other parts of the palm, "is quite suggestive of a loose contact wound in a hand that has been cuffed in some fashion."[84] Specifically, Dr. Dunton believed that the Harrison's hand was cuffed over the barrel of the gun when it discharged; his right hand wound "would be typical" of a struggle over a gun.[85] Furthermore, Dr. Dunton concurred with Hill that the angle of the right abdomen wound indicated a struggle.[86] According to Dunton, the abrasion on Harrison's left abdomen also supported Simpson's account of a struggle, because this superficial injury was likely caused by Harrison's forceful contact with a firm surface area, such as the contact which would occur when two men try to drag one another over a counter.[87] Dr. Dunton concluded that "the most consistent scenario . . . is that [the victim] was shot standing upright from the front . . . ."[88]

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[77] *Id.* at 2833.
[78] *Id.*
[79] *Id.* at 2837.
[80] *Id.* at 2839.
[81] *Id.* at 2842.
[82] *Id.* at 2845-46.
[83] *Id.* at 2846.
[84] *Id.* at 2875.
[85] *Id.* at 2876.
[86] *Id.* at 2880.
[87] *Id.* at 2879.
[88] *Id.* at 2884.

Thus, Dr. Wren's revised opinion concurred with that of Simpson's three experts: Simpson's story of a struggle for the gun was consistent with the physical evidence, and the State's contention that Simpson shot the victim when he was lying on the floor trying to shield himself from the bullet was utterly inconsistent with that evidence.

3. Whether Simpson Acted out of Racial Animus

Jonell Geter testified at trial that shortly before the incident at Harrison's store, Simpson was talking of "kill[ing] a white man." The impact of that testimony, however, would have been greatly blunted had the jury been aware of Geter's motivation to lie and Simpson's racial attitudes: as was revealed in post-conviction proceedings, the State withheld evidence of the former, and defense counsel failed to develop available evidence of the latter.

At the PCR hearing, Simpson introduced a witness information sheet from the State's files showing that Geter ran a "crack house."[89] This information could have been used to impeach the credibility of Geter by suggesting a motive to lie: the need to maintain a good relationship with law enforcement. Geter's credibility could have been further undermined had counsel investigated Simpson's racial attitudes. As the PCR hearing affidavits demonstrated, trial counsel could have marched out an army of character witnesses who would have testified that Simpson grew up in a non-racist home, never uttered a racist comment, harbored no prejudice against white people, and surrounded himself with both black and white friends.[90] Furthermore, these same people would have testified that Simpson was not a violent person.[91] All of his friends and family agreed that Simpson's arrest was shocking and that he generally responded peacefully to situations that would provoke most men to violence.[92] These accounts are hardly consistent with a man who boasts about his plans to "kill[] . . . a white man . . . ."

B. New Evidence of Simpson's Impairments and How They Affected His Behavior at the Crime Scene

In addition to presenting a less aggravated picture of the crime itself, the PCR hearing created a more accurate—and sympathetic—picture of the man who committed it.

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[89] *Id.* (Dyer Dep. Ex. 7).

[90] *Id.* at 5529 (Anderson Aff. ¶ 5); 5538 (Geter Aff. ¶ 4); 5543 (Harris Aff. ¶ 5); 5545 (McDaniel Aff. ¶ 6); 5551 (Pulley Aff. ¶ 5); 5552 (Richardson Aff. ¶ 5); 5556 (Spurgeon Aff. ¶ 5); 5554 (Simpson Aff. ¶ 3); 5559 (M. Sullivan Aff. ¶ 5).

[91] *See, e.g.*, App. at 5529 (Anderson Aff. ¶ 6).

[92] *Id.* at 5529 (Anderson Aff. ¶ 6); 5538 (Geter Aff. ¶ 5); 5539 (Golson Aff. ¶ 6); Harris Aff. ¶¶ 4, 6; 5545 (McDaniel Aff. ¶ 5, 7); 5551 (Pulley Aff. ¶ 4); 5552 (Richardson Aff. ¶¶ 4, 7); 5556 (Spurgeon Aff. ¶¶ 4, 6); 5554 (Simpson Aff. ¶¶ 2, 4); 5558 (D. Sullivan Aff. ¶ 5); 5560 (M. Sullivan Aff. ¶ 6).

1. Childhood Neglect and Deprivation

Dr. Bowers-Andrews, an expert in childhood neglect and deprivation, began by describing the tragic circumstances into which Keith Simpson was born. His grandfather forced his young mother, Pearl Simpson, to have sex with him and a friend. She became pregnant with her father's child, a baby that died shortly after birth. Soon thereafter, Pearl became addicted to alcohol and heroin, and became a prostitute to support her habits. Pearl's short-term relationship with a substance-abusing older man produced Simpson.

Thus, the prenatal deck was stacked against Simpson. As Dr. Bowers-Andrews testified, a mother's heroin addiction during pregnancy can have devastating effects on a fetus's long-term brain development. Heroin addiction affects the fetus's self-regulation, and the eventual ability to regulate both his biological functions and his social behavior.[93] Infants who are exposed to heroin in the womb are much more likely to be hyperactive and have Attention-Deficit Hyperactivity Disorder.[94] Moreover, Simpson was subject to two other intrauterine traumas: chronic alcoholic exposure and his mother's unsuccessful attempt to abort him.[95]

Motherhood did not change Pearl's alcoholism, drug abuse, or prostitution. As Dr. Bowers-Andrews testified, the first two to three years of a child's life "are an absolutely critical phase. The brain grows more rapidly in the first two to three years of life than ever again. . . . So the earliest experiences in life are very critical to shaping who a person is."[96] Pearl's dissolute lifestyle resulted in Simpson being left alone for long periods; eventually he was "found abandoned . . . in a completely saturated crib, and was covered in blisters and welts from having been left alone, and was extremely hungry."[97]

According to Dr. Bowers-Andrews, the long-term effects of Pearl's addictions and prostitution made her psychologically unavailable to her son.[98] Thus, Simpson spent the first eighteen months of his life physically and emotionally neglected to the point where he nearly died. The insecure attachment experienced by Simpson in his infancy was intensified when he was sent to live with his aunt at eighteen months, and then uprooted again only four months later and sent to live in South Carolina with his great-grandparents. As Dr. Bowers-Andrews explained, such disrupted attachment generally yields emotional disorders later in life, such as severe anxiety, depression, and a strong tendency towards Post-Traumatic Stress Disorder.[99]

In the second phase of her social-history assessment, Dr. Bowers-Andrews chronicled the inadequate care-giving Simpson received growing up in his great-grandparents' home in Gray Court, South Carolina. Although his great-

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[93] App., *supra* 1, at 2684.
[94] *Id.* at 2686.
[95] *Id.*
[96] *Id.* at 2687.
[97] *Id.* at 2686.
[98] *Id.* at 2689.
[99] *Id.* at 2688-89.

grandparents were loving, by the time he was a teenager, they were both over eighty years old. Consequently, they were unable to adequately protect and supervise him.[100] Dr. Bowers-Andrews explained that these shortcomings were the root cause of many disturbing events Simpson experienced as a child. Most importantly, an older male cousin repeatedly sexually assaulted Simpson between the ages of six and nine, and Simpson was unable to tell his great-grandparents about that abuse.[101] Similarly, Simpson encountered enormous difficulties in school, failing courses every year despite diligent attendance, but his great-grandparents got him no help. Simpson also witnessed an unusual amount of graphic violence as a child, twice observing a man murdered before his eyes.[102] Simpson's traumatic childhood was worsened by his constant shuttling back and forth between South Carolina and New York.[103] According to Dr. Bowers-Andrews, as a result of Simpson's feelings of inadequacy and vulnerability, he turned to drugs to relieve his anxiety when he was only about ten or eleven.[104]

The third phase of Dr. Bowers-Andrews' assessment focused on the poorly resolved trauma and related disorders experienced by Simpson. Dr. Bowers-Andrews found it laudable that, burdened as he was with numerous social impairments prior to adulthood, Simpson "cope[d] as well as he did."[105] Simpson's downward spiral began with a horrific car accident in 1988, when he saw one of his friends impaled, spoke to him in the wreckage before he died, and saw the top of another friend's head sheared off.[106]

Simpson was never the same person after this experience. According to Dr. Bowers-Andrews, he was obsessed with the accident, talked about it incessantly, and slept little. Not only did he exhibit clear symptoms of survivor guilt, but he also developed depression, Post-Traumatic Stress Disorder, and began drinking heavily.[107] Dr. Bowers-Andrews noted that Simpson experienced anniversary trauma following the accident;[108] his depression, anxiety, and substance abuse became heightened each year around August 28th. Thus, prior to shooting Harrison on September 4, 1993, Simpson "was having a heavy drinking and drug binge because of the anniversary date."[109]

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[100] *Id.* at 2695.
[101] *Id.*
[102] *Id.* at 2696-97.
[103] *Id.* at 2697.
[104] *Id.* at 2696.
[105] *Id.* at 2726.
[106] *Id.* at 2701.
[107] *Id.*
[108] Dr. Bowers-Andrews defined "anniversary trauma" as an event which "occurs when there's the time of year that might trigger a memory of a traumatic event, and . . . other circumstances will often . . . cause an acute intrusion of the emotions that are traumatic that are affiliated with the events." *Id.* at 2728.
[109] *Id.* at 2729.

2. Brain Damage

Dr. Gerald Kragh, an expert in neurology, testified to Simpson's brain damage, the numerous causes of his impairment, as well as the destructive impact the neurological impairment had on Simpson's conduct.[110] Dr. Kragh diagnosed Simpson with encephalopathy, or "abnormal brain." Specifically, Simpson's neurological impairment encompassed the bi-frontal lobe,[111] and though his brain had been abnormal at least since childhood, its condition had worsened.[112]

Dr. Kragh's observation of paranoia, tangential speech patterns, perseveration, headaches, and hyperactivity, were all consistent with the abnormal bi-frontal lobe apparent from Simpson's medical history and during his physical exam.[113] For the final portion of his evaluation, Dr. Kragh administered an electroencephalogram ("EEG") and a quantitative EEG ("QEEG"), which revealed damage across both hemispheres of the frontal lobe of Simpson's brain.[114]

The social history performed by Dr. Bowers-Andrews allowed Dr. Kragh to explain the multiple levels of Simpson's impairment: Genetic predisposition, prenatal exposure to heroin, and an abuse-ridden infancy caused the original abnormal bi-frontal lobe development, and that impairment was compounded by Simpson's eight or nine significant childhood head injuries.[115] Moreover, Simpson's sustained substance abuse worsened his already abnormal brain. As Dr. Kragh explained, prolonged drug use affects the right frontal lobe much like a sharp blow to the head; drugs destabilize a person's ability to make a rational decision.[116] Predictably, extended substance abuse often results in individuals who "make unbelievable decisions . . . , get into arguments . . . , get into fights that were never planned, never anticipated."[117]

According to Dr. Kragh, Simpson was left with a severely limited capacity to reason and an inclination "towards disinhibition, impulsive behavior, emotional inability, poor judgment and . . . lack of social restraints."[118] Finally, Dr. Kragh explained that the use of alcohol or drugs depresses the self-control naturally exercised by the frontal lobe, and in someone like Simpson, who struggled to develop a learned form of this social restraint, the alcohol and drug consumption he engaged in on September 4, 1993, would result in a "reversal of the normal behavior that has been painfully developed."[119]

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[110] *Id.* at 2739.

[111] Dr. Kragh explained that this section of the brain includes the area behind the forehead, above the eyes, and stretching "interhemispherically" across the left and right side of the brain. *Id.*

[112] *Id.* at 2753, 2785.

[113] *Id.* at 2749, 2754.

[114] *Id.* at 2759-61.

[115] *Id.* at 2772.

[116] *Id.* at 2747.

[117] *Id.* at 2748.

[118] *Id.* at 2761.

[119] *Id.* at 2762.

3. Post-Traumatic Stress Disorder

Dr. George Cogar, an expert in clinical psychology with a special emphasis in Post-Traumatic Stress Disorder ("PTSD"), testified to the results of his psychological evaluation of Simpson. According to Dr. Cogar, Simpson suffered from a chronic, delayed, and severe case of PTSD.[120] The DSM-IV specifies certain alternative diagnostic criteria for PTSD, and Dr. Cogar found that Simpson suffered from virtually every symptom on the list.

Dr. Cogar first noted that Simpson was highly prone to develop PTSD even before he experienced any trauma. As Dr. Cogar explained, there are four major life situations which predispose an individual to PTSD: exposure to trauma in utero, a childhood spent in a deprived socio-economic environment, the experience of neglect in the formative years, and the sustaining of repeated physical injuries. Simpson had experienced all four.[121] Moreover, Simpson experienced a number of traumas—the 1988 car accident, falling out of a bus, falling off a moped, and witnessing numerous violent incidents—that could serve as a triggering event. Worst of all, however, was the sexual abuse Simpson suffered, "one of the most damaging occurrences that can happen to a human being."[122] When anal rapes are repeated, the effects are "multiplicative and . . . are worse again . . . when it involves a child . . . ."[123] Thus, the repeated rapes left Simpson particularly vulnerable when later traumas occurred, such as the 1988 car accident. Dr. Cogar further testified that Simpson exhibited more than enough horror and fear regarding all of the above-listed instances of trauma to fulfill the first criterion for PTSD.[124]

The second criterion in the DSM-IV definition of PTSD requires that the individual persistently re-experience the traumatic event in at least one of five ways; Simpson exhibited *all five* possible manifestations of reexperience.[125] The third criterion requires that the individual persistently avoid stimuli associated with the trauma, and exhibit a numbing of general responsiveness in at least three of seven ways; Dr. Cogar found that he exhibited all seven possible symptoms.[126] The fourth criterion requires that an individual must also persistently demonstrate at least two symptoms of increased arousal not present before the trauma; Simpson displayed all five possible symptoms. The fifth criterion, that the above-mentioned symptoms occur for more than one month, was easily satisfied.[127] The last criterion is that symptoms must cause clinically significant distress in social, occupational, and other important areas of functioning, and according to Dr. Cogar, Simpson experienced extraordinary distress throughout

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[120] *Id.* at 3021. Dr. Cogar defined PTSD loosely as "an anxiety disorder" caused by exposure to a traumatic event. *Id.* at 3022.
[121] *Id.* at 3025.
[122] *Id.* at 3033.
[123] *Id.* at 3034.
[124] *Id.* at 3024.
[125] *Id.* at 3028.
[126] *Id.* at 3034.
[127] *Id.* at 3039.

his life, and severe impairment across all spectrums of human functioning. Thus, Simpson's PTSD was neither "mild," nor in doubt, as Dr. Barnard-Dupree testified at trial. Rather, it was chronic and severe.

Dr. Cogar also diagnosed a corollary condition, anniversary trauma. During the weeks surrounding the anniversaries of the 1988 car accident, Simpson would become "irritable, more agitated. He would start drinking more, start using more marijuana." In 1993, his anniversary trauma took the form of a week-long alcohol and drug binge which encompassed the homicide with which he was charged.[128]

In addition to diagnosing PTSD and anniversary trauma, Dr. Cogar, like Dr. Kragh, determined that Simpson suffered from brain damage. Dr. Cogar explained how the combination of PTSD, anniversary trauma, and brain damage tragically culminated in the September 4, 1993, homicide. According to Dr. Cogar, the PTSD and brain damage significantly reduced Simpson's ability to cope, and with such a diminished coping mechanism, Simpson became anxious and rash.[129] Dr. Cogar emphasized that stressful situations, such as a struggle in a convenience store, would bring these harmful traits to the fore: "when [PTSD victims] are placed in situations which require good judgment, when they're under stress, when snap decisions that need to be prudent must be made, frequently they come up very short. And they act in impulsive ways . . . ."[130] In Dr. Cogar's opinion, Simpson's completely nonviolent history confirmed his theory that the homicide was the product of a lifetime of trauma internally eroding a man into a tense, imprudent shell: "What we have is an ineffectual individual who was beset by severe trauma, who coped as well as he could with the limited assets that he was given by God, and had to function in an environment where from before birth, he was disadvantaged and maltreated."[131]

As Dr. Cogar's PCR hearing testimony demonstrated, an expert with adequate information about Simpson's history would have been able to conclusively and confidently diagnose PTSD. Trial counsel failed to provide their forensic psychiatry expert, Dr. Barnard-Dupree, with information about virtually any of the significant traumas in Simpson's history. Consequently, though she suspected PTSD, she could not diagnose it.[132] In post-conviction proceedings, however, Dr. Barnard-Dupree stated that, given the information provided by post-conviction counsel, her previous non-diagnosis of PTSD was unreliable.[133]

Thus, without attempting to excuse Simpson's initial decision to rob the store, the PCR testimony of Drs. Bowers-Andrews, Kragh, and Cogar, along with

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[128] *Id.* at 3041.
[129] *Id.* at 3044.
[130] *Id.* at 3045.
[131] *Id.* at 3047. Dr. Cogar easily distinguished Simpson from individuals who possess Antisocial Personality Disorder. Simpson was no "thug"; he had a sterling attendance record in school, always tried to maintain employment, and was well-liked by his community. *Id.* at 3046. Rather, he was often the victim of thugs. *Id.*
[132] *Id.* at 5536-37 (Barnard-Dupree Aff. ¶¶ 6–8).
[133] *Id.* at 5536 (Barnard-Dupree Aff. ¶ 6).

the affidavit of Dr. Barnard-Dupree, made clear that Simpson's decisions were not fully culpable, and that his judgment and reactions while in the store were not those of a normal person, but were triply impaired by brain damage, a history of extreme abuse and neglect, and PTSD.

C. Evidence of Racial Motivation in the Decision to Seek the Death Penalty

Professor Theodore Eisenberg, an expert in applying statistical reasoning to studies of the legal system, testified to the results of a statistical study of decisions to seek the death penalty in the Seventh Judicial Circuit. Under Professor Eisenberg's direction, data was gathered from court files on all the homicide cases in the Seventh Judicial Circuit from 1977 to 1993, the year of Simpson's offense.[134] He then compiled information for each case about the race of the defendant, the race of the victim, the presence of aggravating factors that would render the crime death-eligible, and whether a notice of intent to seek death was filed.[135]

With respect to the race of the defendant, Professor Eisenberg found no statistically significant effect, but with respect to the race of the victim, he found a "very strong" statistically significant effect.[136] For the period between 1977 and 1993, he found that the Solicitor sought death in half of the fifty-two death-eligible white-victim cases but in *none* of the nineteen death-eligible black-victim cases; such a result would occur by chance about four times in one hundred thousand.[137] Eisenberg also isolated the cases from 1985 to 1993, the period during which Holman Gossett was solicitor, and found that Gossett decided to seek death in forty-three percent of the death-eligible white-victim cases but in none of the black-victim cases. This result, he testified, would occur only six times in ten thousand as a matter of chance.[138] Moreover, the defendant-victim combination most likely to result in the decision to seek the death penalty was a black-defendant/white-victim pairing.[139]

Because Simpson's case involved armed robbery, Eisenberg isolated armed robbery cases, and found that the propensity to seek death in white-victim cases was also very pronounced in this subset. Over the longer period, 1977 to 1993, the resulting disparity would occur by chance only in eight out of one thousand cases; over the period of Gossett's tenure as solicitor, the disparity would occur by chance alone only once out of one hundred times.[140]

Professor Eisenberg also considered whether the age of the defendant might differ in the black- and white-victim cases, thereby providing an alternative

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[134] *Id.* at 2912-13. Professor Eisenberg cross-checked the completeness of those data against the FBI Uniform Crime Reports and concluded that the research performed by his assistant was "incredibly thorough." *Id.* at 2913.
[135] *Id.* at 2913-14.
[136] *Id.* at 2915.
[137] *Id.* at 2915-16.
[138] *Id.* at 2916.
[139] *Id.* at 2919-20.
[140] *Id.* at 2922-23.

explanation. It did not.[141] He acknowledged that he lacked information about the presence of other mitigating factors, but stated that the absence of such data did not raise any doubt in his mind regarding his conclusions. Professor Eisenberg explained that this confidence was due in part to the fact that he had read Gossett's deposition, in which Gossett stated that he could not recall a case in which the presence of a mitigating factor led to a decision not to issue a notice of intent to seek death.[142] Professor Eisenberg further observed that he also thought it was implausible that mitigating factors would be systematically different in black-victim and white-victim cases, noting in particular the presence of mitigating factors in Simpson's case.[143] After considering all of the data, Professor Eisenberg concluded that the race of the victim "plays a significant role in the decision to issue a notice of intent to seek death" in the Seventh Judicial Circuit.[144]

D. The PCR Court's Response to the New Evidence

After hearing all of this evidence – some that changed the picture of the crime, some that changed the picture of the criminal, and some that changed the picture of the prosecution – the PCR court issued a decision focused solely upon the new mitigation evidence. It granted relief upon an ineffective assistance of counsel in sentencing claim after determining that "a substantial wealth of information was neither available for the jury's review nor for a proper presentation by [Simpson's] experts."[145] According to the court, the missing social, medical, and family history "was necessary to make Dr. Barnard-Dupree's assessment and testimony complete," and the jury "was presented with only the tip of the iceberg."[146] Consequently, the jury was "not equipped with all the tools it needed to make a fair and reasoned decision as to whether there existed mitigating circumstances . . . which would have warranted a sentence of life . . . ."[147] Simpson was therefore entitled to a new capital sentencing proceeding where a jury would get a full picture of the available mitigation.

The receptivity to mitigation evidence reflected in this opinion is particularly noteworthy given its author. John C. Hayes, III, is a conservative South Carolina judge. He was a prosecutor and member of the state legislature before he was a judge, and after taking the bench, had been the trial judge in a number of capital cases which resulted in death sentences.[148]

On the other hand, the PCR court's opinion denied all of the claims based upon the new evidence uncovered about the crime itself. Interestingly enough, it

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[141] *Id.* at 2924-25.
[142] *Id.* at 2925.
[143] *Id.*
[144] *Id.* at 2927.
[145] *Id.* at 5730.
[146] *Id.* at 5729.
[147] *Id.* at 5730.
[148] *See* State v. Holmes, 605 S.E.2d 19 (S.C. 2004); State v. Shafer, 573 S.E.2d 796 (S.C. 2002); State v. Hughes, 521 S.E.2d 500 (S.C. 1999); State v. Forney, 468 S.E.2d 641 (S.C. 1996).

did not do so because it found the evidence unpersuasive. Instead, with respect to counsel's failure to uncover evidence that would have supported his client's account of the crime, the court determined that counsel's own demonstration during closing argument was good enough:

> While there is no question but that presentation of expert testimony by experts such as Jeff Hollifield, Wayne Hill, and Dr. Steve Dunton could have given trial defense counsel more to argue in support of Simpson's position, there is also little either factually or theoretically added by the experts. These experts offer opinions consistent with Simpson's position and, in the abstract, their opinions confirm Simpson's position. However, it appears to the court, trial counsel's presentation at trial parallels any argument and theory now available from the experts.[149]

The court was more critical of the prosecution's failure to turn over exculpatory evidence concerning whether money had been taken:

> [The State's delivery of the money, bank bag, and wallet to Harrison's brother] clearly constitutes sloppy police work in an armed robbery investigation and could be considered a tainting of the scene. Clearly the contents of the bag could have been exculpatory. Clearly this evidence should have been preserved and, thus, been subject to discovery by Applicant.[150]

But instead of deciding whether Simpson was entitled to relief based on this *Brady* violation, the PCR court declared, "this issue has not been presented to the court [with sufficient specificity in the application for post-conviction relief] and, therefore, cannot be addressed."[151] As to the suppression of evidence that Geter ran a crack house, although the PCR court held that the State had been duty-bound to provide that evidence to defense counsel, it denied relief on the basis of this *Brady* violation because trial counsel "thoroughly cross-examined" Geter about his drug involvement and because "[t]he 'crack house' allegation was bottomed purely on 'rumor.'"[152] The PCR court also declined to grant relief based upon the evidence of racial disparity in seeking the death penalty, though like its decision with respect to the new crime scene evidence, not because it deemed the evidence unpersuasive. Rather, it found that counsel was not ineffective in failing to challenge Solicitor Gossett's decision to seek the death penalty as racially motivated because counsel made a strategic decision not to do so. With respect to the underlying merits of the racial discrimination claim, the lower court viewed the South Carolina Supreme Court's decision in *Thompson v. Aiken*[153] as controlling, despite the fact that the statistics relating to Solicitor

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[149] App., *supra* 1, at 5696.
[150] *Id.* at 5703 (citing Brady v. Maryland, 373 U.S. 83 (1963) and Kyles v. Whitley, 514 U.S. 419 (1995)).
[151] *Id.* at 5704.
[152] *Id.* at 5726.
[153] 315 S.E.2d 110 (S.C. 1984).

Gossett—who had *never* sought the death penalty in a black-victim case—were far starker than the state-wide statistics presented in *Thompson*.

E. The Victim's Family's Response

Representatives of the victim's family, including Joe Harrison's wife and brother, were present for the entire post-conviction relief hearing. Mindful of the importance of victim outreach,[154] as well as (we hope) sensitive to the human tragedy of the death of Joe Harrison, we introduced ourselves to the victim's wife shortly after the start of the hearing. Our conversation then was short, but her reaction was not hostile. Then, before calling the pathologist, Dr. Dunton, one of us (John) went to the family to tell them that Dr. Dunton would be talking about the crime itself, and would show photos of the injury and the autopsy, explaining the reason for this testimony but also expressing concern lest they be taken by surprise. Although they said little, they seemed appreciative. Perhaps that made some difference in their attitudes toward us, and by proxy, toward Keith Simpson.

In any event, after the PCR court filed an order granting Simpson a new sentencing trial, but denying post-conviction relief with respect to the convictions, and denying motions for reconsideration from both sides, Simpson's counsel approached the *new* Solicitor of the Seventh Judicial Circuit seeking settlement. The Solicitor contacted the victim's family, determined that they were receptive to a settlement, and thereafter entered into an agreement with Simpson under which Simpson agreed to waive the time he had served, and be re-sentenced to twenty years to life. Re-sentencing pursuant to that agreement was scheduled to occur on Friday, October 4, 2002.

Despite the entire victim's family's affirmation, in the presence of representatives of the Attorney General's Office, that they desired an end to the litigation, on Wednesday, October 2, 2002, the Attorney General's Office filed a Notice of Appeal. Simpson then filed a notice of cross-appeal, but he also moved the PCR court to lift the stay created by the Notice of Appeal; the lower court, with obvious reluctance, denied that motion.[155]

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[154] *See, e.g.*, Mickell Branhan & Richard Burr, *Understanding Defense-Initiated Victim Outreach and Why It Is Essential in Defending a Capital Client*, 36 HOFSTRA L. REV. 1019 (2008).

[155] The PCR court determined that the relief Simpson sought was prohibited by state appellate rules. It did however, note that it found "it strange that the Attorney General would trump a duly elected Solicitor's desire as to a how a case within the Solicitor's jurisdiction should be handled." The trial court also commented that Simpson's conduct, "while obviously self-serving, is arguably more compassionate than the conduct of the State at this juncture in the proceedings." Order, November 13, 2002 at 3-4.

IV. THE STORY THE SOUTH CAROLINA SUPREME COURT TOLD: AN ABORTED ROBBERY BY A CAPITALLY INELIGIBLE DEFENDANT?

The South Carolina Supreme Court granted both the Attorney General's petition for certiorari on the sentencing phase relief granted by the PCR court and Simpson's petition for certiorari for the denial of guilt phase relief. Thus, the South Carolina Supreme Court had before it the new evidence relating to both the crime scene and the man who committed the crime. In addition, it was presented with the evidence of racial discrimination by the now-deposed Solicitor, because racial discrimination in seeking the death penalty was presented as an alternative ground for upholding the lower court's grant of sentencing phase relief based upon ineffective assistance of counsel.

Then, presented with the same evidence as the PCR court, the South Carolina Supreme Court told another story. Its certiorari-after-PCR story differed not only from the PCR court's story, but also from the story told by the South Carolina Supreme Court itself on direct appeal. That something had changed is signaled in the opinion's first paragraph; for instead of describing the crime in one sentence, as did the direct appeal opinion, a longer account is provided.[156] Moreover, despite its greater length, the new description omits the conclusion (contained in the direct appeal's single sentence) that the killing occurred during a robbery.[157]

It turns out this omission foreshadowed the ground on which the court granted relief. Unlike the PCR court, the higher court was seemingly unimpressed by the new mitigation evidence. It reversed the PCR court's decision to grant a new sentencing hearing related to the murder conviction, concluding that trial counsel had not been derelict in failing to present available mitigation evidence, and, in the alternative, that Simpson had not been prejudiced by any of trial counsel's omissions.[158]

Instead, it granted relief solely based upon the new picture *of the crime* revealed at the PCR hearing. Indeed, its focus was much narrower than "the crime"; it was completely uninterested in the evidence impeaching Simpson's purported racial motivation, and, perhaps more surprisingly, completely uninterested in the evidence disproving the execution-style killing. It only partially reversed the PCR court's decision denying relief on the *Brady* claims, and relied solely on the new evidence that suggested no money was taken. According to the court, the State withheld evidence that was material *with respect to the armed robbery charge.*[159] This entitled Simpson to new trial on the armed robbery charge, but more importantly, affected his death sentence: because robbery was the only aggravating circumstance submitted to the jury, if the jury had not convicted Simpson of armed robbery, he would not have been death-eligible. The court therefore instructed that if, at retrial on the armed robbery

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[156] *See* Simpson v. Moore, 627 S.E.2d 701, 704-05 (S.C. 2006).
[157] *See id.* at 705.
[158] *Id.* at 712.
[159] *Id.* at 708.

charge, the State were to obtain a conviction, then, but only then, would Simpson face a new sentencing hearing on the murder conviction.[160]

V. CONCLUSION: A FUTURE FOR KEITH SIMPSON—AND FOR JOE HARRISON'S FAMILY

The decision of the South Carolina Supreme Court put the ball back in the new Solicitor's court. He had not changed his mind about the appropriateness of a plea, and the victim's family had not changed their minds. Three and a half years after the plea was originally scheduled to take place, it actually occurred. The terms were the same as agreed upon prior to the appeal the Attorney General's Office forced upon the Solicitor, the victim's family, and Simpson: Simpson agreed to waive all further appeals, and both parties agreed that he would be parole-eligible in 2022.

Simpson may or may not be paroled. His behavior in prison has been very good, so it is certainly possible he will be. Regardless of whether he is paroled, he has a future. With the end of litigation, Joe Harrison's family also can turn toward the future, and maybe they can do so with just a little less bitterness than they felt at the end of the trial. The new Solicitor's Office can put behind it the illegal behavior of its predecessors, particularly that of one odious "investigator"; we hope it will do so with reinforced commitments to both racial neutrality and the truth.

These good results all came from investigation, though it is still hard to say which facts moved whom. Did the victim's family feel differently when it learned that the execution-style killing never happened? Did it feel a little pity for the traumatized child Keith Simpson had been? Did the new Solicitor, looking at all the facts, decide it wasn't a "death case"? Did the PCR court really only care about the unpresented mitigation, or was it also moved by the misconduct of the former Solicitor? Conversely, did the South Carolina Supreme Court care only about misconduct, and nothing about the man on trial? How is it that no court focused on the new picture of the killing itself, which, as it turns out, was probably not racially motivated, and definitely not execution-style.

Finally, did *any* decisionmaker care about the former Solicitor's egregiously racialized seeking of death? The reader, upon hearing the conclusion of the Simpson litigation, may wonder why this article reports the evidence of racial motivation at all, since to all appearances, it did not convince anyone. Nonetheless, we told the race story, both because the statistics were stark enough to convince *us*, and because opinions often don't tell the whole story. Almost every practicing lawyer has had the experience of having relief granted on one ground, while being convinced that facts unrelated to that ground motivated the grant of relief. This is especially so with respect to race claims; both the feelings of shame attached to the recognition of persistent racial discrimination and the desire to avoid acknowledging the persistence of such discrimination are often powerful. Sometimes, the desire to avoid confronting such a claim tips the scales

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[160] *Id.* at 712.

to favor granting relief on some less controversial claim that could have gone either way. Indeed, one might wonder whether both the post-conviction hearing court and the South Carolina Supreme Court were influenced, at the margin, to grant relief on claims that could easily have gone the other way.[161]

Likely we will never know the answers to most of these questions. We have our own theories, but we are both experienced enough to know our theories might be wrong. What we do know is that scarce resources—time, money, and closure—were wasted, and that those resources might have been conserved had the jury been given a more accurate picture of the crime and the man who committed it. But, in Keith Simpson's case, as in so many others, the true picture of both did not emerge until post-conviction proceedings. Unless the death penalty is abolished—which for the first time in our professional careers seems possible—or the criminal justice system is radically reformed to require competent, adequately funded trial counsel and force prosecutors to disclose all information favorable to the defense, this pattern will, like Sisyphus rolling the rock up the hill only to see it roll down, continue to repeat itself.

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[161] *See* Sheri Lynn Johnson, *Litigating for Racial Fairness After* McCleskey v. Kemp, 39 COLUM. HUM. RTS. L. REV. 178, 184-85 (2007).